Supreme Court, U.S.
FILED
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(2)

No. 10-935

In The
Supreme Court of the United States

KENNETH L. SMITH,
Petitioner,

v.

HON. CLARENCE THOMAS, *et al.*,
Respondents,

On Petition For Rehearing

Kenneth L. Smith,
in propria persona
23636 Genesee Village Rd.
Golden, Colorado 80401
(303) 526-5451

QUESTION PRESENTED

In an official capacity action, where lower courts held that they "lacked jurisdiction to order the Supreme Court to take any action," in light of the public confession by a Justice of this Court that he had previously **sat in judgment of an official capacity action after he accepted an apparent bribe from an interested party**, does the Justices' refusal to consider an appeal on the basis of a presumed conflict of interest—without making any attempt to justify that decision in writing or establish binding precedent—violate a litigant's First Amendment right of access to the courts (specifically, by refusing to resolve a legitimate constitutional question properly presented to the courts), Fifth Amendment right to due process of law (including "the right to hear why" and to rely on precedent), and/or its equal protection component?

OTHER PARTIES TO THE PROCEEDING

The Respondents are initial defendants who participated in the appeal in the Court of Appeals for the District of Columbia: Chief Justice JOHN G. ROBERTS, JR, and Associate Justices CLARENCE THOMAS, ANTONIN G. SCALIA, ANTHONY M. KENNEDY, RUTH BADER GINSBURG, SAMUEL A. ALITO,, JR. STEPHEN G. BREYER, all of which **have been named** in this action **in their official capacities only**, thereby entitling them to hear this appeal. Justice JOHN PAUL STEVENS resigned from the bench during the pendency of this matter; accordingly, any action taken with respect to him would by definition be moot. As Justice Stevens' successor, Associate Justice ELENA KAGAN is joined in this appeal as a matter of statutory law.

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DECISION CHALLENGED

A copy of the unpublished Order of the Court is included as an Exhibit with this Petition, at p. 24.

STATEMENT OF JURISDICTION

Jurisdiction exists pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 44. The Order in question issued on Mar. 7, 2011; this petition is considered as timely filed when mailed on or before Apr. 1, 2011.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

Article III, section 1, of the United States Constitution states, in pertinent part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

The First Amendment to the United States Constitution states, in pertinent part:

> Congress shall make no law ... abridging ... the right of the people ... to petition the Government for a redress of grievances.

The Fifth Amendment to the United States Constitution states, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

28 U.S.C. §2109 provides, in pertinent part:

> In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

STATEMENT OF THE CASE

Call it The Roberts Paradox. On March 7, 2011, this Court has achieved what no American court has ever before dared: **It held that the Constitution is no longer the paramount law of our land**. *Cf. Reid v. Covert*, 354 U.S. 1 (1957).

The lower courts in this case ruled that they did not have jurisdiction to even entertain the question of whether this Court's practice of *certiorari* review is constitutional. If they cannot decide it, and this Court cannot reach a quorum when the question is presented to it, then no one can challenge the practice. A statute impervious to constitutional challenge is above the Constitution, by definition.

This case arises from the bizarre *sua sponte* recusal of eight Justices, sued in their **official** capacities, in direct and irreconcilable conflict with centuries of precedent. For instance, Justice Scalia refused to recuse himself in a matter involving his friend Vice-President Cheney on the grounds that the petition before the Court was an "official capacity" lawsuit, observing that

> ...while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, **it has traditionally NOT been a ground for recusal where official action is at issue, no matter how important the official action was to**

> **the ambitions or the reputation of the Government officer.**

Cheney v. United States Ct. of App. for the District of Columbia, 541 U.S. 913, 916 (2004) (Scalia, J., memo; hereinafter, "Scalia Memo at [page]").

No reason was offered for this astonishing break from precedent. As reason is the soul of law, 2 J. Bouvier, *A Law Dictionary* 209 (15th ed. 1883), and equal treatment, the soul of justice, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989), such a profound repudiation of centuries of practice should at least have been explained in a manner reconcilable with the Constitution those Justices swore to uphold.

This, in turn, begs an obvious question: whether this inexplicable departure from precedent violates Petitioner's right to due process of law or its equal protection component and, by necessary implication, his First Amendment right of access to the courts and if so, whether these prudential concerns render 28 U.S.C. §§1 and 1257 unconstitutional.

PUBLIC POLICY CONSIDERATIONS DEMAND THAT THIS PETITION BE HEARD.

Even cursory examination of the news of the day reveals that the recusal practices of the Justices is a matter of considerable public importance. A group of Congresspersons led by Rep. Anthony Weiner (D-

NY) have implored Justice Thomas to recuse in any case questioning the constitutionality of Obamacare, Anthony D. Weiner, Letter (to Justice Thomas), not dated (copy on file), and Sen. Orrin Hatch (R-UT) is asking the same of Justice Kagan. Senator: Kagan Should Sit Out Health Care Case, *USA Today*, Feb. 4, 2011. Over one-hundred law professors recently wrote a joint letter imploring Congress to impose an ethics regime upon this Court, Mark N. Aaronson, et al., Letter (to Sen. Patrick Leahy, et al.), Feb. 23, 2011, and Rep. Chris Murphy (D-CT) has unveiled legislation aimed at doing that. Christopher Murphy, *Murphy Unveils Legislation to Increase Transparency and Accountability at Supreme Court (press release)*, Mar. 1, 2011 (copies on file). And of course, Rep. James Sensenbrenner (R-WI) and Sen. Charles Grassley (R-IA) have resurrected their plan to have an Inspector General oversee our courts.

This case comes before this Court at a time where public respect for our courts is at a historic low, and with compelling justification. When a Justice openly admits that you are little more than a band of black-robed dictators,[1] it tends to be corrosive to the rule of law. But more directly, our courts are no longer "judicial tribunals" but rather, mere proxies for the

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[1] Justice Kagan used the euphemistic "Platonic Guardians"; "benevolent dictators" exist only in Aristotlean theory. Sam Stein, Kagan: In *Bush v. Gore*, Court Was Affected By Politics and Policy, *Huffington Post*, May 19, 2010.

two factions striving for control of our kleptocracy. Since *Bush v. Gore*, where virtually every judge's position was a direct function of which faction put him or her into office,[2] the veneer of *legal reasoning* has become comically transparent. As Edward Lazarus incisively observed:

> Remember *Bush v. Gore*? Scalia was the most vocal member of a narrow five-justice majority that not only handed Bush the presidency, but also handed Cheney the Vice-presidency. Worse still, the Court, including Scalia, committed this extraordinary act on the basis of a legal opinion that was so transparently devoid of logic and so contrary to the usual views of the justices who propounded the opinion, that it could be reasonably be viewed as an act of naked political partisanship.

Edward Lazarus, Scalia's Refusal to Recuse: Why His Lengthy Explanation Is Completely Unconvincing, And Why *Bush v. Gore* Provides Even More Reason to Recuse, *Findlaw*, Apr. 1, 2004.

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[2] See, *Palm Beach County Canvassing Board v. Harris*, 772 So.2d 1220 (Fla. 2000); *Gore v. Harris*, 773 So.2d 524 (Fla. 2000); *Bush v. Gore*, 531 U.S. 98 (2000) (virtually perfect correlation); see also, *New Jersey Democratic Party, Inc. v. Samson*, No. A-24 Sept. Term 2002 (N.J. 2002); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (same).

ARGUMENT

The central question posed to the Court in *Smith v. Thomas* was simple and straightforward:

> Can Congress (or this Court, acting *sua sponte*) impose restrictions upon the jurisdiction of Article III courts in such a way as to eviscerate the Bill of Rights?

"Questions Presented," Petition, *Smith v. Thomas*, No. 10-935 (U.S., filed Jan. 18, 2011).

Anyone who endured the first year of law school should recognize the problem as the one presaged by *Ex parte McCardle*, 74 U.S. 506 (1869): If Congress can limit the jurisdiction of our courts in such a way as to deprive the citizen of any legal remedy for the violation of a constitutional right, it necessarily has the power to eviscerate the Bill of Rights. *Cf., Marbury v. Madison*, 5 U.S. 137, 163 (1803). As the Bill of Rights was plainly intended to restrain Congress, Preamble, Bill of Rights (1791); *see*, The Federalist No. 78 (Alexander Hamilton), this Court is obliged to invalidate such a provision as unconstitutional. And by implication, any judicially-created practice having the same effect is unconstitutional, for much the same reason.

Over the years, this Court has consistently recognized that federal litigants have certain rights, such as that to "equality before the law," *United States v. Bajakajian*, 524 U.S. 321, 338 (1998), to procedural

due process, *Carey v. Piphus*, 435 U.S. 247 (1978), to have grievances heard by a fair and independent tribunal, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), and to rely on pronouncements of this and other courts as authoritative expositions of what "the law" is. *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). These rights are all "conferred, not by legislative grace, but by constitutional guarantee." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985) (internal quotation omitted). But if the courts can foreclose all remedies for their breach, these rights are extinguished. *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1884).

Certiorari review deprives federal litigants of all of these rights, exposing them to the tender mercies of the talent-challenged political hacks of the lower courts, many of whom have "bought" their way onto the bench, either directly or indirectly.[3] Moreover, it deprives citizens of the ability to rely on the pronouncements of our courts as an authoritative statement of what "the law" is. Law not only becomes not known but *unknowable*, as it was during the reign of Emperor Caligula.[4]

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[3] *See e.g.*, Will Evans, Money Trails Lead to Bush Judges, *Salon.com*, Oct. 31, 2006, at http://www.salon.com/news/feature/2006/10/31/money_trail;Denis Hamill, Getting Judgeship A (50) Grand Thing, *N.Y. Daily News*, Oct. 25, 2005, at 3.

[4] Suetonius, *The Lives of the Twelve Caesars* 280 (trans. A. Thomson; Bell, 1893), Ch. 4, § LXI (121) (Caligula published laws high on a wall, in small print, so no one could read them).

I. THE ROBERTS PARADOX

> Our peculiar security is in possession of a written constitution. Let us not make it a blank paper by construction. If [our public officials' powers are boundless] then we have no constitution. If it has bounds, they can be no other than the definition of the powers which that instrument gives.

Thomas Jefferson, Letter (to Wilson Nicholas), Sept. 7, 1803 at 2.

In choosing to recuse in this matter, the Roberts Court has declared that **no one can decide whether *certiorari* review is constitutional**. Congress (and this Court) can only act within the limitations of the Constitution ... but yet, no one can authoritatively ascertain just what those limitations are.

"The United States is entirely a creature of the Constitution. Its power and authority have no other source. **It can only act in accordance with all the limitations imposed by the Constitution**." *Reid v. Covert*, 354 U.S. at 5-6 (emphasis added). When that venerable document says that "Congress shall pass no law," the authors meant what they said and said what they meant. *See, Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (collecting cases). But if none have standing to challenge the constitutionality of laws enacted by Congress in the lower courts, and the Justices must recuse themselves, how can the powers of our Imperial Congress

ever be challenged?

II. THE SCALIA GAMBIT

Even Justice Scalia admits it: To not put too fine a spin on it, during the pendency of a case in which he was a party, **Vice-President Cheney handed the Scalia family** what was tantamount to **a five-figure bribe**.[5] *Scalia Memo* at 2. After all, most of us little people will never know the sybaritic pleasures of riding in a private jet, being unable to justify the extravagance. Scalia confesses his friendship with Cheney, and the trip was set "long before the Court granted certiorari" in the case. Id. at 2. All Cheney needed was four votes; he had one in the bank, and a formidable advocate on the Court.

In any civilized jurisdiction—in Colorado, your mileage will vary[6]—this fact scenario is grounds for mandatory recusal. But Justice Scalia invoked this Court's *de facto* Rule of Necessity, which provides:

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[5] The value of a bribe is its value to the recipient. *E.g.*, *United States v. Gorman*, 807 F.2d 1299, 1305 (6th Cir. 1986);*United States v. Williams*, 705 F.2d 603 (2d Cir. 1983) (business loan). A medium-sized private jet costs ~$3-4,000 per hour, according to a survey of websites offering the service.

[6] *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (per curiam), *cert. denied*, 547 U.S. 1067 (2006) (justices decided a case in which they were defendants in tort, despite the fact that non-conflicted judges were authorized by statute to hear it).

> Even one unnecessary recusal impairs the functioning of the Court. ... In this Court, where the absence of one Justice cannot be made up by another, **needless recusal deprives litigants of the nine Justices to which THEY ARE ENTITLED**, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.

William H. Rehnquist, *et al.*, Statement of Recusal Policy of the Supreme Court of the United States, Nov. 1, 1993, at 1-2 (emphasis added).

According to a quorum of this Court,[7] a citizen's right to have his case heard by an unimpaired Court is so important that a Justice can still hear a case if he takes an apparent bribe from a litigant who *just happens* to be a personal friend. *Cheney, supra; see also, Microsoft Corp. v. United States*, 530 U.S. 1301 (2000) (CJ Rehnquist's son as counsel).

Justice Scalia further distances himself from Mr. Cheney by declaring that the lawsuit was an official capacity case, asserting that "it has traditionally not been a ground for recusal where official action is at

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[7]Six active Justices have publicly endorsed the Statement, Id; Lyle Denniston, Roberts' Recusal Policy, *SCOTUSblog*, Sept. 30, 2005; Tony Mauro, Justice Alito's Green Day, *Legal Times*, Feb. 6, 2006.

issue, **no matter how important the official action was to the ambitions** or the reputation **of the Government officer**." Scalia Memo at 4 (emphasis supplied). By this metric, given the paramount importance of citizen access to this Court—even excusing a five-figure bribe—it logically follows that a Justice should never recuse in an official capacity action.

But yet, Justice Scalia did precisely that!

Justices of this Court have been known to cast a deciding vote in cases affecting their personal interests, corporate patrons, and friends, bending the law for their benefit.[8] Even where it appeared to all the world that **wife Ginni accepted a bribe** on behalf of Justice Thomas' family, he cast the deciding vote in the recent *Citizens United* case.[9] But Justices have always rationalized these abuses of office under the rationale that these were "official capacity" actions,

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[8] *See*, Christopher Marquis, Contesting the Vote: Challenging a Justice, *N.Y. Times*, Dec. 12, 2000, at 26 (Thomas handed the 2000 Presidential election to Bush in *Bush v. Gore*, while his wife vetted possible Bush Administration staffers); Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*" Geo. J. Legal Ethics 34 (2003) (citing multiple, uncontested sources indicating that Justice O'Connor wanted to retire, but didn't want to be replaced by a Democrat appointee).

[9] *See*, Emergency Mot. for Recusal of Justice Thomas and/or to Suspend the Rule of Four, *Smith v. Thomas*, No. 10-935 (U.S. filed Feb. 16, 2011), presenting the case in detail.

implicating the ancient proposition that it was better for a conflicted judge to hear a case than for it to not be heard at all. *See, United States v. Will*, 449 U.S. 200, 213-16 (1980), and cases collected therein. Now, all of a sudden, in an official capacity lawsuit threatening the enormous power and prerogatives of this Imperial Court, eight Justices pulled a 180° quicker than Linda Blair in *The Exorcist*....

You can't make this stuff up.

III. THE *MARBURY* REPUDIATION

What this Court leaves unanswered in the wake of the Justices' mass recusal is why the ancient Rule of Necessity does not apply to this situation. When the question of judicial salaries was on the line, this Court had no difficulty in finding that the Rule was not superseded by 28 U.S.C. § 455, on the grounds that the public "might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the questions presented." *Id. at 217.* But now, in an equally crucial case questioning the power and prerogatives of this Imperial Court, Congress suddenly has the power to "foreclose federal courts from exercising 'the province and duty of the judicial department to say what the law is.'" *Id.* (quoting *Marbury*, 5 U.S. at 177). *To state the case is to refute it.*

CONCLUSION

The difference between a judge and a dictator is that whereas a judge is obliged to explain decisions with reference to pre-existing law, dictators merely issue ukases without comment. On that score, Chief Justice Roberts may now take his well-earned place among his new peers.

WOLF, meeting with a Lamb astray from the fold, resolved not to lay violent hands on him, but to find some plea to justify to the Lamb the Wolf's right to eat him. He thus addressed him: "Sirrah, last year you grossly insulted me." "Indeed," bleated the Lamb in a mournful tone of voice, "I was not then born." Then said the Wolf, "You feed in my pasture." "No, good sir," replied the Lamb, "I have not yet tasted grass." Again said the Wolf, "You drink of my well." "No," exclaimed the Lamb, "I never yet drank water, for as yet my mother's milk is both food and drink to me." Upon which the Wolf seized him and ate him up,

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saying, "Well! I won't remain supperless, even though you refute every one of my imputations."

The tyrant will always find a pretext for his tyranny.

Aesop, *The Wolf and the Lamb* (~600 B.C.) (emphasis added).

The Wolf is the Supreme Court, accustomed to ravishing citizens' rights. But when a citizen raises an unassailable objection to its practices, **the Court runs home to Mommy like a spooked child**, whimpering under her skirt? "B-B-But Congress wrote a law," the Justices whine, "and we have to follow it!" Remember, this is the same Court claiming a *constitutional mandate* to invalidate laws *written by* Congress....

Even *Gadhafi* wouldn't make this stuff up.

You don't need to be an Einstein to figure out that in this unprecedented recusal decision, the Justices placed their fingers on the scales of justice to benefit themselves. *Certiorari* review cannot be defended, as it deprives the citizen of equal justice under law, voiding the Constitution by depriving citizens of the benefit of their bargain. *N.H. Const.*, part I, art. 2-3. And, were it found unconstitutional, the Justices would be forced to spend 99% of their time fixing the endless stream of self-evident errors committed by

our corrupt lower courts. The size of the Court could increase ten-fold, which means that no one will offer seven-figure advances for their autobiographies, or invite them to rub elbows with the Queen.

This decision really *is* all about them.

The mass decision to recuse in *Smith v. Thomas* is an embarrassment to this Court, which should (under Supreme Court Rule 44) be reconsidered—or at least, *explained*.

Respectfully submitted,

__/s/_____
Kenneth L. Smith
23636 Genesee Village Rd.
Golden, Colorado 80401
Tel: (303) 526-5451

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 2,951 words, excluding those parts of the document exempted by Supreme Court Rule 33.1(d), and that the text is set in the Century family (New Century Schoolbook).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 30, 2011.

_/s/_ _____
Kenneth L. Smith, in propria persona

REQUIRED RULE 44 STATEMENT

The Justices' mass recusal in this, an *OFFICIAL CAPACITY* action, is a repudiation of five centuries of precedent. *See United States v. Will*, 449 U.S. 200 (1980). More importantly, it creates a constitutional solecism: A statute which is impervious to constitutional challenge is, by definition, above the Constitution; **accordingly, the Constitution is no longer the paramount law of our land**. *Cf. Reid v. Covert*, 354 U.S. 1 (1957). This bizarre state of affairs precipitates the following constitutional question:

> In an official capacity action, where lower courts held that they "lacked jurisdiction to order the Supreme Court to take any action," in light of the public confession by a Justice of this Court that he had previously **sat in judgment of an official capacity action after he accepted an apparent bribe from an interested party**, does the Justices' refusal to consider an appeal on the basis of a presumed conflict of interest—without making any attempt to justify that decision in writing or establish binding precedent—violate a litigant's First Amendment right of access to the courts (specifically, by refusing to resolve a legitimate constitutional question properly presented to the courts), Fifth Amendment right to due process of law (including "the right to hear why" and to rely on precedent), and/or its equal protection component?

Traditionally, the "Rule of Necessity" has always provided a workable solution to this problem, but for some reason that this Court neglected to explain, it was not invoked here.

As the history of this case establishes, no lower court would accept jurisdiction over such a question. As there is no recognized provision empowering a citizen to prosecute an original action in this Court, the only conceivable way a remedy can be secured is through a petition for rehearing. For this reason, Petitioner hereby certifies and warrants that this Petition is being presented in good faith, and not for purpose of delay.

/s/ _____
Kenneth L. Smith

Exhibit 1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 7, 2011

Mr. Kenneth Smith
23636 Genesee Village Road
Golden, CO 80401

Re: Kenneth L. Smith
v. Clarence Thomas, Associate Justice,
Supreme Court of the United States, et al.
No. 10-935

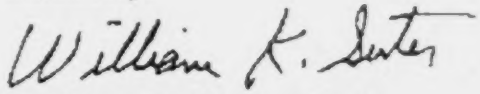
Dear Mr. Smith:

The Court today entered the following order in the above-entitled case:

Because the court lacks a quorum, 28 U.S.C. §1, and since the only qualified Justice is of the opinion that the case cannot be heard and determined at the next Term of Court, the judgment is affirmed under 28 U.S.C. §2109, which provides that under the cir-

cumstances "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court." The Chief Justice, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice Breyer, and Justice Sotomayor took no part in the consideration or decision of this position.

Sincerely,



William K. Suter, Clerk